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United States of America

In the Supreme Court of the United States

October Term, 1943

No. 465

WAYNE APARTMENTS, Inc.,
LAREDO APARTMENTS, Inc.,
YORK APARTMENTS, Inc.,
9225 BROADSTREET CORPORATION, NORTHWEST APARTMENTS, Inc.,
Michigan corporations,
Petitioners,

v.

MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION,
Respondent.

Respondent's Brief Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

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I

Opinions Below.

The opinion of the Supreme Court of the State of Michigan, review of which is sought on *certiorari*, is officially reported as:

Wayne Apartments, Inc., v. Unemployment Compensation Commission, 305 Mich. 714.

That opinion, however, is based upon a decision rendered on the same day (June 7, 1943), which is officially reported as:

> Iron Street Corporation v. Unemployment Compensation Commission, 305 Mich. 643.

And the opinion in Iron Street Corporation v. Unemployment Compensation Commission, *supra,* follows a former decision officially reported as:

> Godsol v. Unemployment Compensation Commission, 302 Mich. 652 (also reported in 142 ALR 910).

II

Summary Statement of Matters Involved.

We accept petitioners' summary statement of the matters involved.

III

Basis of Jurisdiction.

While counsel fail to cite the provisions of the Judicial Code, or the rule of this Court, on which they rely to sustain jurisdiction, they probably have in mind § 237, Judicial Code (Title 28 U.S.C. § 344 [b]), and Court Rule 38.

Our position is that the state court has not decided a federal question of substance not heretofore determined

in principle by this Court *(Carmichael v. Southern Coal Co.,* 301 U. S. 495), nor has it decided such a question in a way probably not in accord with applicable decisions of this court.

IV

Question Presented.

The question for decision is whether there is substance in the claim that the 'affiliate clause' of section 41 of the Michigan Unemployment Compensation Act, as construed and applied to them by the court below, denies petitioners due process or equal protection of the laws (Fourteenth Amendment, Federal Constitution;—Act No. 1, § 41 [3], Pub. Acts Mich. 1936, Extra Session, as amended by Act No. 347, Pub. Acts Mich. 1937).

V

Summary of Statute Involved.

The act in question, passed by the legislature in exercise of their taxing authority and in exertion of state police powers, declares public policy in respect of involuntary unemployment (§ 2), and creates a commission to administer the law (§ 3).

> "Briefly stated, that act provides for a segregated fund created, in large part, by assessment upon employers of workmen and to be administered by a state commission with mapped procedure",

Chrysler Corporation v. Smith, 297 Mich. 438, 442.

Paraphrasing the language of this Court in considering a similar enactment by the Alabama legislature (*Carmichael v. Southern Coal Co.*, 301 U.S. 495, 505, 506), it may be said that the Michigan Unemployment Compensation Act sets up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by the act,—§ 13 (as amended by Act 347, 1937), § 40 (unamended), and § 41 (as amended by Act 347, 1937) comprising the substantive law of the subject-matter of this litigation.

The Act imposes upon the employers the obligation to pay a certain percentage of their total monthly payrolls into the state unemployment compensation fund (§ 13, as amended), which is kept 'separate and apart from all public moneys or funds of the state' and is administered in trust 'exclusively for the purposes of' the act (§ 26, as amended by Act 324, 1939).

Benefits are payable therefrom to the employees covered by the act, in the event of their unemployment, upon prescribed conditions and at prescribed rates (§ § 27, 28, 29). **[1]**

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[1]

Section 11 of the act provides full cooperation with the Federal Social Security Board, and the statute in general satisfies the criteria which, by § 903 (a) of the Social Security Act of August 14, 1935, c. 531, 49 Stat. 620, 640, 42 U.S.C. § 1103 (a), are made prerequisite to its approval by the Social Security Board created by that act, and it has been approved by the Board as that section directs. By § 902 of the Social Security Act, contributors to the state fund are entitled to credit their contributions in satisfaction of the tax imposed on employers by the Social Security Act, to the extent of 90% of the tax. Carmichael v. Coal Co., supra.

The term 'employing unit', used by the legislature in defining an 'employer' obligated to contribute to the fund, means (§ 40) 'any individual or type of organization', inclding corporations.

And 'employer' (§ 41 as amended) means:

"(1) Any employing unit which in each of twenty [20] different weeks within the current calendar year or within the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight (8) or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), including any employing unit (for which service deemed employment as defined by this act is or was performed during such current or preceding calendar year) subject (during such current or preceding calendar year) to the pay roll tax levied by title nine (9) of the social security act;

(2) Any individual legal entity or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this act;

(3) Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other

employing units or interests, or both, would be an employer under paragraph (one) of this section;

(4) Any employing unit which having become an employer under paragraph [one], [two], [three] or [four] hereof, has not, under sections twenty-three [23] and twenty-five [25] of this act, ceased to be an employer subject to this act; or

(5) For the effective period of its election pursuant to section twenty-five [25] any other employing unit which has elected to become fully subject to this act.''

VI

Reasons for Opposing the Allowance.

The reasons relied on for allowance of the writ, possess no merit:

1. It is said that the court below has decided a federal question (the constitutionality of the affiliate clause of the Michigan Unemployment Compensation Act), in a way conflicting with the determination of this Court in denying certiorari in

Independent Gasoline Co. v. Bureau of Unemployment Compensation, 190 Ga. 613, 10 S.E. 2d 58 (certiorari denied, 311 U.S. 707).

One answer is that 'the denial of a writ of certiorari

imports no expression of opinion upon the merits of the case, as the bar has been told many times',

United States v. Carver, 260 U.S. 482, 490,

Atlantic Coast Line R. Co. v. Power, 283 U.S. 401, 403.

Furthermore, the facts involved in the Georgia case bear little resemblance to those presented here.

2. Petitioners urge that the state court decided the question in a way probably not in accord with an applicable decision of this Court,

Retirement Board v. Alton Railroad Co., 295 U.S. 330,

but, we respectfully submit, the 'affiliate clause' of the Michigan act sustained in the court below, does not come within range of this Court's sweeping denunciation of the railroad retirement act; and a subsequent decision upholding the constitutional validity of a similar measure of social significance (the Alabama Unemployment Compensation Act), as against objections closely resembling those urged at bar, announces the controlling principle,

Carmichael v. Southern Coal Co., 301 U.S. 495.

It should also be noted that the learned Justice who wrote the dissenting opinion in the *Carmichael* case, *supra,* cited *Retirement Board v. Alton R. Co., supra,* as authority for the view that the Alabama unemployment compensation act was grossly unfair.

3. Petitioners also contend that 'if this Court has not settled the question as to the constitutionality of the affiliate clause, then, an important question of federal law remains, which question has not been, but should be settled by this Court *in view of the conflicting decisions of various state courts'*.

While this Court have indicated as one of the reasons to be considered on an application for *certiorari* to a circuit court of appeals, the fact that such a court 'has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter' (Rule 38 [b]), that rule does not apply to a conflict of decisions in state courts.

We further reply that the question here raised, was set at rest in principle by the decision of this Court in the case of *Carmichael, supra,* and that the decisions of state courts cited in counsel's brief reveal that, while a small minority seem to sustain petitioners' position (though such decisions are distinguishable), the great weight of authority and the decided trend of judicial thought upholds the constitutional validity of such an 'affiliate clause' as is found in § 41 of the Michigan Unemployment Compensation Act.

See Annotation following unofficial report of

Godsol v. Unemployment Compensation Commission, supra, found in 142 ALR 918.

VII

Argument

Point One

There is no substance in the claim that the challenged legislation, as construed and applied below, denies due process of law.

In urging that due process of law has been denied, counsel do not state precisely in what manner the statute affects the peculiar situation in which the petitioners have placed themselves.

The court below, when construing the language of § 41 (3) of the act for the purpose of testing its validity, most carefully applied the statute to the precise facts involved, and restricted consideration of its provisions to the setting supplied by the record, [2] for it appeared, and the court found that:

> "The five corporations involved have boards of directors consisting of the same persons, namely: George Levey, his wife, Mrs. George Levey; and Joseph G. Aller. George Levey actively manages the business of all five corporations, is the president of each corporation. He receives his management fees

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[2]

"These principles have been recognized by the Supreme Court of the United States. That tribunal has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and never to consider the constitutionality of state legislation unless it is imperatively required". 11 Am. Jur., Constitutional Law, § 98, p. 722.

> proportionately from all five corporations. These corporations all have the same common purpose, owning and operating apartment buildings".

And, we might add, it is also worthy of note that Ruby Evick, who in this case sought and obtained unemployment compensation, had been employed, during consecutive periods of time, by three of the corporations involved, *viz,* the Northwest Apartments, Inc., the Wayne Apartments, Inc., and 9225 Broadstreet Corporation (R. 31-32).

Exercise of the same degree of judicial care is manifest in the companion case *(Iron Street Corporation v. Unemployment Compensation Commission,* 305 Mich. 643, 653) where the court observed the importance of noting the nature of the businesses in which the organizations involved in the cases cited were engaged.

> "It thus appears (say the court) that, in the instances where the affiliate clause has been held to apply to a corporation, the businesses of the employing units have been somewhat related to each other. **[3]**

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[3]

Connecticut.—New Haven Metal & Heating Supply Co. v. Danaher (1941) 128 Conn. 213, 21 A. 2d 383.

Maine.—Maine Unemployment Compensation Commission v. Androscoggin Jr., Inc. (1940) 137 Me. 154, 16 A. 2d 252.

Mississippi.—Mississippi Unemployment Compensation Commission v. Avent (1941) —— Miss. ——, 4 So. 2d 684.

Missouri.—Kellogg v. Murphy (1942) —— Mo. ——, 164 SW 2d 285; —Warren Brokerage Co. v. Unemployment Compensation Commission (1943) 13 So. 2d 227.

New Jersey.—Wiley Motors Inc. v. Unemployment Compensation Commission (1943), 130 N.J. Law 30, 31 A. 2d 39.

Wash.—State v. Kitsap County Bank (1941) 10 Wash. 2d 520, 117 P. 2d 228.

> We, therefore, hold that where one or more of the employing units is a corporation and the business conducted by either unit is relevant or incidental to the business of the other, the several employing units must be deemed to come within the classification of the affiliate clause, section 41 (3)".

In so holding, the Court approves the following statement found in the opinion of the Missouri Supreme Court, Division 2 *(Kellogg v. Murphy,* 349 Mo. 1165, 1182, 164 S.W. 2d 285):

> "We hold the affiliate clause, subsection (h) 4, should be construed to refer to businesses which by location, nature or common experience might not unreasonably be expected to operate under substantial unification in the absence of such a statute; and to those where there is evidence of actual unifications. . . . But it is our conclusion that the two businesses involved in this case come within that rule—a general printing business and a newspaper publishing business conducted at the same address and under common major ownership. This is true although they were and previously had been operated as separate entities".

It might be observed at this point, that the situation presented in the case at bar (as defined by the court below) is a far cry from that involved in *Railroad Retirement Board v. Alton R. Co.,* 295 U.S. 330.

It may also be noted, in considering the two cases upon which counsel rely, that the supreme courts of Georgia and Indiana do not rest their decisions upon an alleged denial of due process, but condemn the legislative classi-

fication set up by the affiliate clause of the unemployment compensation acts of their respective states,

Independent Gasoline Co. v. Bureau of Unemployment Compensation, 190 Ga. 613, 10 S.E. 2d 58,

Benner-Coryell Lumber Co. v. Indiana Unemployment Compensation Board, 218 Ind. 20, 29 N.E. 2d 776.

There is, therefore, little, if any, authority for the proposition that the provisions of § 41 (3) of the Michigan statute, are, *as presently applied,* so arbitrary, unreasonable or capricious, as to deprive the corporations involved of their property without due process of law.

As the court below said when first called upon to consider the constitutionality of this act *(Godsol v. Unemployment Compensation Commission,* 302 Mich. 652, 663), such a provision as that found in the affiliate clause

> "is not arbitrary nor unreasonable. On the contrary, such provision is necessary in order that the benefits of the act be not denied and the purposes of the act as a whole be not frustrated to many employees by reason of disintegrated ownership and control. A reasonable relationship between the statute and the evil sought to be controlled brings the statute within the limits of constitutionality".

So clearly is our position stated in the opinions of the supreme court of this state, that it scarcely seems necessary to repeat what is there said, or to cite and discuss the many authorities cited.

We respectfully submit that petitioners' claim of denial of due process of law, lacks sufficient substance to justify a review by this Court.

Point Two

Nor is there substance in the contention that the affiliate clause of the act in question, denies petitioners the equal protection of the laws.

Again without attempting to apply general principles to the precise facts disclosed by the record, counsel rely entirely upon the Indiana and Georgia cases, *supra,* with a side glance at the decision of this Court in *Retirement Board v. Alton R. Co.,* 295 U.S. 330.

The argument of the Georgia court (in the case of the *Independent Gasoline Company, supra),* and adopted by petitioners, runs as follows:

> "This defendant does not employ the minimum of eight required by the act to render it subject. No competitor of defendant, whether an individual or corporation, having only five employees, as does this defendant, is subject to the provisions of the act or required to pay any tax thereunder. Therefore, if this defendant is required by . . . . (the affiliate clause) to pay the tax, it is thereby definitely carrying a tax burden from which all others, both individuals and corporations, similarly situated are exempt. There is no room for doubt that in such circumstances this defendant is denied the equal protection guaranteed by the Federal Constitution".

And some reference is made to 'innocent and helpless minority stockholders'.

The Michigan Supreme Court points out, in the companion case of the *Iron Street Corporation, supra* (upon which the decision at bar rests), that the answer to the proposition advanced by the Georgia court is found in the following statement of the Connecticut court in *New Haven Metal & Heating Supply Company v. Danaher,* 128 Conn. 213, 21 A. 2d 383:

> "The formula established by the statutory provision in question applies to all employers similarly situated, that is, to all employers whose businesses are under common ownership or control, the question is resolved to whether the classification has a fair and substantial relation to the object of the legislation. If it has, it is valid. If it has not, it is arbitrary, unreasonable and capricious, and therefore void. It is apparent from the plan embodied in the act as already stated that its primary object is to relieve the distress of unemployment, and that the imposition of the tax upon employers is incidental".

That decision, and the opinion of the Michigan Supreme Court which followed it, rests upon the broad general principles stated by this Court when upholding, as against such an objection, the constitutionality of the Alabama unemployment compensation law,

> *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509.

In the case of *Carmichael, supra,* appellant challenged the validity of that section of the Alabama act which

excluded from taxation all employers of less than eight workmen, on the ground that it denied equal protection of the laws.

Passing upon the validity of the tax *qua* tax, and leading to consideration of this classification (held reasonable), Mr. Justice Roberts, who spoke for the Court, said:

> "(p. 509) This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation (citing numerous decisions of this Court).
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts wihch would support it (citing authorities).
>
> This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of

facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function".

This principle guided the Michigan Supreme Court to their decisions in the *Godsol* case and in the *Iron Street Corporation* case, *supra,* which was followed in the case at bar.

In the case of *Iron Street Corporation,* the court say:

"As pointed out in the *Godsol* case, one of the purposes of the section is to prevent employers from avoiding the obligations imposed by the statute, by dividing their businesses, and we stated there, and repeat now, that the classification thus imposed has a fair relation to the object of the legislation in question. The class created by statute includes employing units with less than eight employees which are owned or controlled by other employing units or by the same interests which own or control another employing unit, which, if treated as a separate unit with such other unit or units, employs eight or more. The tax that is imposed is levied equally upon all that come within this class (citing *Carmichael v. Southern Coal Co.,* 301 U.S. 495, 509)."

And, meeting the further objection (raised here as well) that the employers involved are not evading the tax, the court say:

"(p. 655) However, the possibility that evasive practices may be perpetrated is, as pointed out in

the Washington case, sufficient justification for the classification. The controlling test as to the meaning of a statutory provision is always the legislative intent when fairly ascertainable. . . .

Appellee also argues that in some of the cases cited there was an evident attempt to evade the effect of the statute. Whether such an intent in fact existed does not in any manner detract from the force of the reasoning and logic of the conclusion reached in the authorities cited''.

We, therefore, respectfully submit that, since there is a conceivable state of facts to support it, the classification in question cannot be said to be unreasonable, arbitrary or capricious, and there is no substance in petitioners' claim that the affiliate clause of the Michigan act denies them equal protection of the laws.

VIII

Relief Prayed.

For the reasons set forth in this brief, we respectfully submit that a writ of *certiorari* should be denied.

Respecfully Submitted,

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